



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 15, 1994

Mr. James R. Raup  
McGinnis, Lochridge & Kilgore  
1300 Capitol Center  
919 Congress Avenue  
Austin, Texas 78701

OR94-356

Dear Mr. Raup:

On behalf of the Austin Community College, you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 24761.

Austin Community College ("ACC") received an open records request for information relating to an internal employee grievance proceeding. Specifically, the requestor seeks four categories of information:

1. All grade changes made by supervisors without the instructor's permission for the following time periods: Fall Semester 1991; Spring Semester 1992; Summer Session 1992; Fall Semester 1992; Spring Semester 1993; Summer Session 1993; Fall Semester 1994. . . . [including] the name of the instructor, the course title and number, the section number, the name and title of the supervisor who changed the grade; the date of the grade change; the nature of the grade change (for example, "F" to "C"); and the reason, if any, given for the grade change. . . . [excluding student identifying information].
2. A memo from Ken Wright, Executive Assistant to the President, to you concerning Richard Manson's grievance. . . .
3. A copy of Austin Community College's audited financial report for fiscal year 1993 presented to the Board of Trustees at its February 7, 1994 meeting.

4. Any documents showing Austin Community College's legal expenses for the period September 1, 1992 through January 31, 1994.

You advise us that the information responsive to categories 3 and 4 above will be made available to the requestor. You object, however, to releasing the remaining information. You claim that section 552.103 excepts from disclosure all the remaining information. You also claim that the information responsive to category 1 above does not exist in the form requested and is excepted from disclosure by section 552.026 of the Government Code. Finally, you claim that section 552.111 excepts from disclosure the information responsive to category 2.

First, we address your assertion that the information responsive to category 1 above does not exist in the form requested and, thus, that ACC may refuse to provide any documents responsive to category 1. You inform us that ACC does not maintain any documents indicating whether an instructor has given permission for a grade change. Although the grade change form contains a signature line, the absence of the instructor's signature may mean that the instructor was unavailable to sign the form as well as that the instructor refused to sign or was unaware of the change. Obviously, you cannot provide documents that do not exist. However, a governmental body has an obligation to make a good faith effort to relate a request to information that it holds. Open Records Decision No. 561 (1990) at 8. Therefore, you need to tell the requestor what documents in ACC's possession may provide the information that the requestor wants and permit the requestor to determine whether he wants the information you offer, some other information, or no information at all.

Next, we address your assertion that section 552.103 of the Government Code excepts categories 1 and 2 above from required public disclosure. Section 552.103(a) excepts from required public disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Information is excepted from public disclosure by section 552.103(a) if litigation is pending or reasonably anticipated and the information relates to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd

n.r.e.). Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 (1990) at 5; 511 (1988) at 3. Whether litigation may be anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

You claim that ACC may reasonably anticipate litigation because the requestor has verbally threatened the department with litigation on several occasions, once on radio. You also indicate that the requested information relates to a pending grievance and that the grievance is pending litigation. This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, Open Records Decision No. 555 (1990). On the other hand, the mere fact that a requestor publicly states on more than one occasion an intent to sue does not trigger section 552.103(a). Open Records Decision No. 452. You have provided us with no information that indicates that the requestor has done more than publicly threaten ACC with litigation. Accordingly, we conclude that in this instance litigation is not reasonably anticipated. Furthermore, in this case you have not demonstrated that the pending grievance is pending litigation under section 552.103(a). Therefore, ACC may not withhold the requested information under section 552.103(a) of the Government Code.

You also assert that the information responsive to category 1 above may be protected by section 552.026 of the Government Code. Section 552.026 incorporates the requirements of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, into the Open Records Act. Open Records Decision No. 431 (1985). FERPA provides the following:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . . ) of students without the written consent of their parents to any individual, agency, or organization . . . .

20 U.S.C. § 1232g(b)(1). "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

*Id.* § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 462 (1987) at 14-15; 447 (1986).<sup>1</sup> Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982); 206 (1978).

The requestor expressly excludes from the scope of his request the names or any other information that would tend to identify students. Moreover, you have not provided any facts to suggest that releasing the remaining information, including the course, the semester taken, and the reason for the grade change, would be releasing personally identifiable information regarding any student. We conclude, therefore, that the requested information is not confidential under FERPA and may not be withheld under section 552.026 of the Government Code.<sup>2</sup> We have marked the information we believe personally identifies particular students and, thus, has not been requested.

Finally, we address your claim that section 552.111 of the Government Code excepts some of the requested information from required public disclosure. Section 552.111 excepts from disclosure an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the section 552.111 exception and concluded that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. In addition, this office concluded that an agency's policymaking functions do not encompass internal administrative or personnel matters. Open Records Decision No. 615 at 5-6. In this case, the requested information relates to an internal administrative and personnel matter, *i.e.*, an employee grievance. Accordingly, section 552.111 does not except the requested information from required public disclosure. ACC must release the requested information in its entirety.<sup>3</sup>

---

<sup>1</sup>The phrase "student record" in section 552.114 has generally been construed to be the equivalent of "education records." Thus, our resolution of the availability of this information under FERPA in this instance also resolves the applicability of section 552.114 to the requested information. *See generally* Attorney General Opinion H-447 (1974); Open Records Decision Nos. 539 (1990); 477 (1987); 332 (1982).

<sup>2</sup>We note, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, if facts exist to indicate that releasing all or part of the requested information would be releasing personally identifiable information regarding any student, you should resubmit this portion of your request along with the relevant facts.

<sup>3</sup>We decline to address your query about the cost provisions of the Open Records Act. Section 552.306 authorizes the attorney general to determine whether requested information is public or is within one of the exceptions of Subchapter C of the Open Records Act. The Open Records Act, however, does not authorize the attorney general to determine the appropriate costs a governmental body may charge for production of requested information. Questions of costs should be directed to the General Services Commission.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Margaret A. Roll  
Assistant Attorney General  
Open Government Section

MAR/GCK/rho

Enclosures:    Marked documents

Ref.:    ID# 24761

cc:    Charles Zucker, Ph. D.  
         Executive Director  
         Texas Faculty Association  
         316 West Twelfth Street  
         Austin, Texas 78701  
         (w/o enclosures)